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No. 00-1429

In the Supreme Court of the United States

JOSEPH E. KATZ and ROGER P. MOORE,
on behalf of themselves and 128 others similarly situated,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Petition for Writ of Certiorari affirmatively demonstrated that this Court's holding in ***Kimel v. Florida Board of Regents***, 528 U.S. 62, 120 S.Ct. 631 (2000), destroyed the **only** source of federal court subject matter jurisdiction which was ever thought to exist in this case. This is because ***Kimel*** expressly declared that Congress' extension of the ADEA to the states by statutory amendment was itself improper and invalid, and therefore, unconstitutional. There was no other source of federal court jurisdiction than the ADEA in this case. The Petition also demonstrated that this Court ought to clarify the relationship between Eleventh Amendment immunity and subject matter jurisdiction as its various pronouncements on the issue, both current and historical, leave litigants and lower courts to grapple (inconsistently) with the problem of the "hybrid nature" of sovereign immunity in applying the Court's Eleventh Amendment holdings, such as ***Kimel***, to pending cases.

Respondent, the Regents of the University of California, by Brief in Opposition simply and erroneously argues that Petitioners, as private litigants, here seek to invoke the state's Eleventh Amendment immunity and that they have no right to do so. (Brief in Opp. pp. 6, 20). Petitioners simply do not assert this.

Respondent further maintains its simplistic arguments that the Eleventh Amendment operates only as an affirmative defense, a privilege to be asserted or waived at the state's sole option and pleasure. (Brief in Opp. p. 20). This position entirely ignores that there is **any relationship at all** between the Eleventh Amendment and the very jurisdiction of the federal courts which is conferred by Article III of the United States Constitution. In addition, this argument sidesteps

altogether not only the language of the Amendment itself, but also a whole body of Supreme Court precedent that discusses the limitation on a federal court's Article III powers imposed by the Eleventh Amendment.

The Brief in Opposition further fails to acknowledge that unlike the Ninth Circuit here, other Federal Circuit Courts of Appeals have in fact recognized that the Eleventh Amendment sufficiently invokes the "jurisdictional bar" so as to destroy subject matter jurisdiction, even in the absence of a state asserting its immunity. In so-doing, Respondent misses the fundamental point that if the Eleventh Amendment does indeed partake of the "jurisdictional bar", as the Supreme Court has so held, then the very existence or not of federal court subject matter jurisdiction simply cannot depend solely upon whether a state chooses, at its pleasure and at anytime, to assert or waive a limitation on a court's very judicial power. This is because subject matter jurisdiction cannot be conferred on a federal court by a party's consent.

Petitioners briefly reply to these arguments below.

ARGUMENT 1

Reply to Respondent's Statement of the Case

Respondent asserts in its Statement of the Case that Petitioners were not excluded from retirement benefits by reason of their age in that they were never eligible for such benefits because they were not members of the University of California Retirement Plan ("UCRP") and were instead members of the Public Employees Retirement System ("PERS"). (Brief in Opp. p. 1). It was in fact this lack of eligibility which constituted the *de facto* discrimination because whether an employee was eligible for the benefits was

itself dictated by age. This is because all those who were not eligible were by necessity older, having been employed by the Lawrence Berkeley and Lawrence Livermore National Laboratories prior to 1961 when the University adopted a new retirement plan for all new employees that excluded the Petitioners. Respondent also asserts that in order to have offered similar benefits to the Petitioners, Respondent would have had to create a new retirement plan at a huge cost. (Brief in Opp., p. 1-2). There simply was no evidence offered at trial to support this statement.

Respondent asserts that it was Petitioners who chose the federal forum in the first instance and who affirmatively stated on appeal that the Ninth Circuit had subject matter jurisdiction. (Brief in Opp., p. 2, 3). Of course, Petitioners did so prior to this Court's decision in ***Kimel***, and moved to dismiss immediately thereafter when, for the first time, it became clear that federal court subject matter jurisdiction was lacking.

Finally, Respondent disputes that at trial, the District Court *sua sponte* dismissed Petitioners' disparate impact claims, noting that Respondent had previously moved for summary judgment on those claims. (Brief in Opp. p. 2, ftnt 3). While Respondent did so move, that motion was denied. At the time of the District Court's actual dismissal of the claims, there was no motion pending and the Court thus acted *sua sponte*.

ARGUMENT 2

Kimel Held That Congress' Extension of the ADEA to the States by Statutory Amendment Was Itself Unconstitutional, Thereby Destroying the Only Basis of Federal Court Subject Matter Jurisdiction Ever Thought to Exist in this Case

The very language of ***Kimel***, extensively quoted in the Petition for Writ of Certiorari (Petition, pp. 10-11, 14-16), leaves no doubt that the Supreme Court was there addressing the **very constitutionality** of the 1974 Amendments to the ADEA, which for the first time extended liability thereunder against states as employers. ("This is not the first time we have considered the **constitutional validity** of the 1974 extension of the ADEA to state and local governments". ***Kimel, supra***, 517 U.S. at 72. (Emphasis added)). The Court held in ***Kimel*** that Congress **had exceeded its power** in enacting the Amendments and thus left private litigants seeking money damages against state employers to the "avenues of relief remain[ing] available" in state courts. ***Kimel, supra,*** 517 U.S. at 91. Contrary to Respondent's arguments, the Court's holding in ***Kimel*** **was not expressly made and is not by implication dependent upon whether a state has asserted its immunity**. Nor could it have been because the very basis of the holding was the conclusion that Congress had acted invalidly and unconstitutionally by enacting the 1974 Amendments at all.

Respondent's arguments that the "*ratio decidendi*" of ***Kimel*** (Brief in Opp., p. 12) only means that a state employer may now decide at its pleasure whether to assert its immunity in the face of a claim for damages under the ADEA by a private litigant, Congress not having validly abrogated

Eleventh Amendment immunity in its extension of the Act to the states, **simply does not comport with the actual language or implications of the *Kimel* holding to which the Ninth Circuit was bound in this case**. The Court's express language in ***Kimel*** certainly overrides Respondent's interpretation of its "*ratio decidendi*".

Respondent further argues that Petitioners' interpretation of ***Kimel*** would mean a complete departure from the Supreme Court's holding in ***Wisconsin Department of Corrections v. Schacht***, 524 U.S. 381, 118 S.Ct. 2047 (1998). In that case, the Court simply held that the presence of claims that were barred by the Eleventh Amendment did not destroy original removal jurisdiction over non-barred claims, removal having there furnished an independent basis for federal court subject matter jurisdiction. The instant case is readily distinguishable in that **there are no non-barred claims remaining** after ***Kimel*** which have independently conferred federal court subject matter jurisdiction, such as the removal or diversity statutes.

Thus, Respondent is simply incorrect that review must here be denied in order to comport ***Kimel*** with ***Schacht***. Moreover, Respondent has entirely ignored that the ***Schacht*** Opinion expressly states that the Court **has not yet decided whether Eleventh Amendment immunity reaches subject matter jurisdiction**. ***Schacht, supra***, 524 U.S. at 374. The very inconsistency between approaching sovereign immunity like *in personam* jurisdiction and at the same time discussing such immunity in terms of judicial power and subject matter jurisdiction which was noted in Justice Kennedy's concurring Opinion in ***Schacht*** (***Id.*** at 376) belies Respondent's assertion that that case compels the conclusion that sovereign immunity does not reach subject matter jurisdiction. In fact, the Court's noting of this inconsistency in ***Schacht*** supports the grant of

certiorari in this case in order to clarify the very issue which Petitioners here raise- i.e. the effect of sovereign immunity on subject matter jurisdiction in light of ***Kimel***.

ARGUMENT 3

Eleventh Amendment Immunity Is Interrelated With and Limits a Federal Court's Article III Powers, Which Are Jurisdictional and Which Cannot Be Conferred or Withdrawn by Consent of a Party

Respondent asserts, and the Ninth Circuit so concluded both here and in ***Hill v. Blind Industries and Services of Maryland***, 179 F.3d 754 (9th Cir. 1999), *as amended* 201 F.3d 1186 (2000)[1], that Eleventh Amendment immunity is nothing more than an affirmative defense, a personal privilege which a state may solely assert "at its pleasure". This limited

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[1]The Ninth Circuit in ***Hill*** determined that voluntary participation in the action by the state constituted a waiver of sovereign immunity. The state there had **not** expressly claimed its immunity until the first day of trial. This is a finding of constructive or implied waiver of immunity that is not permitted under ***College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board***, 527 U.S. 666, 119 S.Ct. 2219 (1999). Despite Respondent's arguments to the contrary, the ***Hill*** decision contradicts and is undermined by ***College Savings Bank*** to which the Ninth Circuit was bound as precedent. Moreover, if in the Ninth Circuit under ***Hill***, "a state may not actively participate in the lawsuit and test the winds of litigation before asserting Eleventh Amendment immunity" (Brief in Opp., p. 10), then Respondent's entire theory that sovereign immunity is a personal privilege that may be invoked or waived by the state at its pleasure falls flat.

and simplistic view ignores not only the language of the Eleventh Amendment itself, but years of Supreme Court precedent in which numerous Opinions recognize and acknowledge that the Eleventh Amendment is in fact a limitation on the judicial power of the federal courts as conferred by Article III of the Constitution and that no action of the parties can confer subject matter jurisdiction upon a federal court. (See cases cited at Petition, p. 25-26). If sovereign immunity were to be treated merely as an affirmative defense which is unrelated to subject matter jurisdiction and Article III judicial power as Respondent urges, then indeed a party would have the power to confer or withdraw subject matter jurisdiction upon a federal court "at its pleasure". This conclusion is logically inescapable if Respondent's position and the Ninth Circuit's published Opinion in this case are left to stand. Such a conclusion also promotes and allows forum shopping by states, even **after** an unfavorable result in a federal court, and is therefore anathema to judicial economy.

ARGUMENT 4

The Ninth Circuit's Decision in This Case Is in Conflict with Other Circuit Courts of Appeals

The Petition for Writ of Certiorari specifically cited cases from the Second and Sixth Circuit Courts of Appeals which have considered the Eleventh Amendment to reach subject matter jurisdiction such that the respective Courts *sua sponte* dismissed barred claims even in the absence of assertion of immunity by the defendant state (Petition, p. 21-22). See ***Butler v. New York State Department of Law***, 211 F.3d 739 (2d Cir. 2000); ***Reese v. Michigan***, *cert. denied*, 2001 U.S. LEXIS 2030 (U.S. March 5, 2001).

In spite of ***Butler*** particularly, Respondent boldly asserts that no cases from other Circuits exist or were cited which are in conflict with the Ninth Circuit in this case. (Brief in Opp. 14-18). Respondent supports this assertion by arguing that it is "unclear from the ***Butler*** Opinion whether or not the Second Circuit raised the Eleventh Amendment issue *sua sponte*" and that the "opinion does not recount the procedural history of the case in sufficient detail to determine whether or not the state had previously asserted its immunity". (Brief in Opp., p. 14-15). A simple reading of ***Butler*** itself discloses otherwise. There, the Second Circuit Court of Appeals clearly considered **on its own** and in the absence of the state asserting immunity that subject matter jurisdiction did not exist over that ADEA action against a state in the wake of ***Kimel***. ***Butler, supra***, 211 F.3d at 742-743, 745-746.

Respondent further cites to ***Richardson v. New York State Department of Correctional Service***, 180 F.3d 426 (2d Cir. 1999) as evidence that the Second Circuit is in accord with the Ninth concerning Eleventh Amendment immunity and its effect on subject matter jurisdiction. In ***Richardson***, in direct contrast to the Ninth Circuit's decision in ***Hill, supra***, the Second Circuit held that a state does not waive immunity by failing to assert it as an affirmative defense in an answer and that the defense may be raised by summary judgment after voluntary participation in the action. The ***Richardson*** Court, citing ***Atlantic Healthcare Benefits Trust v. Googing***, 2 F.3d 1 (2d Cir. 1993), expressly observed that the Second Circuit has viewed the Eleventh Amendment as affecting its subject matter jurisdiction and has raised the issue *sua sponte* to dismiss claims against a state, ***Richardson, supra***, 180 F.3d at 448.

The ***Richardson*** Court's discussion also highlights the confusion surrounding the extent to which sovereign immunity reaches subject matter jurisdiction citing varying Supreme Court decisions and concluding that immunity is **"jurisdictional enough"** that it need not be raised at all in the trial court. ***Id.*** at 448-449. This conclusion, at odds with the Ninth Circuit in ***Hill, supra***, is that which Petitioners have urged promotes inequitable forum shopping by states following an unfavorable litigation result and discourages judicial economy. This conclusion also directly conflicts with Supreme Court precedent that subject matter jurisdiction upon a federal court cannot be conferred by consent of the parties. See ***Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea***, 456 U.S. 694, 102 S. Ct. 2099 (1982). This contradiction is unavoidable if this Court by denial of certiorari in this case lets sovereign immunity remain as "jurisdictional enough", due to its "hybrid nature", so that its quasi-status perpetuates its murky and inconsistent application.

Respondent further argues that the string of cases cited in the Petition from other Circuits in which Courts have considered subject matter jurisdiction to have been destroyed following a state's assertion of sovereign immunity are irrelevant to this case. (Brief in Opp., p. 17-18). Respondent asserts this irrelevance because here, immunity was expressly waived whereas it was asserted by the states in those cases. While the assertion of immunity or lack thereof may be a distinction, it is one without a difference in this case if, as Petitioners argue, federal court subject matter jurisdiction has already been eliminated by reason of ***Kimel*** in ADEA cases, and other Supreme Court precedent in other cases in which statutes enacted by Congress have been declared to be unconstitutional under the Eleventh Amendment. See United States Supreme Court cases cited at p. 7-8 of the Petition.

The cases cited by Petitioners from other Circuits than the Ninth nevertheless demonstrate that those Circuits apply sovereign immunity differently because they acknowledge that such immunity does indeed affect a Court's own subject matter jurisdiction in a way that the Ninth Circuit fails to do in its classification of immunity as merely an affirmative defense to be asserted by the state at its pleasure like *in personam* jurisdiction. The Ninth Circuit's approach falls short of even acknowledging that at a minimum, sovereign immunity has a "hybrid nature" and that it reaches a court's subject matter jurisdiction at all.

CONCLUSION

Wherefore, Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case and, ultimately, to vacate the judgment below and dismiss the matter without prejudice in order that Petitioners may repair to the state court.

Respectfully submitted,

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